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## Essay

# When Too Little Is Too Much: Why the Supreme Court Should Either Explain Its Opinions or Keep Them to Itself

Jonah J. Horwitz<sup>†</sup>

In 1972, the Supreme Court released what appears on its face to be one of the simplest opinions in its history. That decision, *Baker v. Nelson*,<sup>1</sup> read, in its entirety: “The appeal is dismissed for want of a substantial federal question.” That’s it. Eleven straightforward words. But, as is often the case in the law, great complexity lurks under the surface, for this terse order has been cited by no fewer than sixty-two judicial opinions and 314 secondary sources. Even more amazingly, *Baker* has come to assume a prominent place in the debate over gay marriage, one of the most controversial legal battles of our era. This is so because the decision by the Minnesota Supreme Court under review in that case held that same sex marriage was not protected by the Constitution.<sup>2</sup> Consequently, the U.S. Supreme Court’s cursory order could be read as an acknowledgment that bans on same sex marriage are constitutionally permissible.<sup>3</sup> For these reasons, the order is discussed at length in the Second Circuit’s opinion in *Windsor v. United States*,<sup>4</sup> the vehicle for the Supreme Court’s landmark judgment on the Defense of Marriage Act.<sup>5</sup>

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1. 409 U.S. 810 (1972).
2. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).
3. See, e.g., *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) (summarizing that argument), *cert. denied*, No. 12-97, 2013 WL 3213571 (U.S. June 27, 2013).
4. 699 F.3d 169, 178–79 (2d Cir.), *aff’d*, 133 S. Ct. 2675 (2013).
5. *Windsor*, 133 S. Ct. 2675.

Unsurprisingly, *Baker* is also examined in detail in the briefs in that case before the Supreme Court. To give some idea of the order's importance in *Windsor*, the respondent opens its case for applying rational basis, a critical piece of its argument, with a paragraph on *Baker*.<sup>6</sup> In another demonstration of how significant the summary dismissal became to the dispute, one amicus brief goes out of its way to chastise the district court for cavalierly disobeying precedent in its treatment of *Baker*.<sup>7</sup>

Eleven words have given birth to thousands of others, and have led to endless debate amongst courts, litigants, and scholars, unnecessarily consuming their valuable time and energy. The solution is self-evident. In *Baker*, the Supreme Court should have either explained why it believed there was no "substantial federal question" or just dismissed the appeal without providing any justification for its decision.<sup>8</sup> The one thing it should not have done was flatly state a legal conclusion while offering no reasoning whatsoever, requiring us all to engage in a lengthy, high-stakes, and ultimately pointless game of mind-reading. More broadly, the Supreme Court (and any other appellate court) should strive to avoid declaring legal principles if it is unwilling to substantiate them, lest it create more confusion in the law than clarity.

To put the argument in context, consider first principles. The most fundamental and distinctive quality of the common law system is that the opinion of an appellate court binds a future court sitting within the same jurisdiction.<sup>9</sup> That is, a judge must resolve any given dispute consistently with the resolution of similar disputes in the past.<sup>10</sup> In this way we get predictability in the law and all the other benefits that come with it: efficiency, fairness, and so on.<sup>11</sup> To effectively apply a previous de-

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6. Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 25–26, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at \*25–26.

7. Brief Amicus Curiae on the Merits of Citizens United's National Committee for Family, Faith and Prayer et al. at 5 n.4, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 355759 at \*5 n.4.

8. Because the appeal was one of right, the Court could not just deny certiorari as it ordinarily can. See HARVARD LAW REVIEW EDITORIAL BD., *Developments in the Law – The Constitution and the Family*, 93 HARV. L. REV. 1156, 1274 (1980).

9. See, e.g., Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 491 (2009).

10. See, e.g., Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 86 (2000).

11. See, e.g., *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 403

cision to a present controversy, it helps to know what the previous judge was thinking in ruling as he or she did. There are typically numerous facts in a given case, and often a number of discrete legal issues. *Which* aspect of Officer Smith's interrogation did or did not violate Defendant Doe's Fifth Amendment rights?<sup>12</sup> *What* about ABC Corporation's conduct did or did not constitute wrongful termination?<sup>13</sup> In the absence of such information, a court is left to stumble through the dark in a blind search for unarticulated legal principles and unemphasized dispositive facts. Or, viewing the issue from a more cynical perspective, a court is free to discern whatever rule it desires in the service of reaching a pre-determined outcome.<sup>14</sup>

On top of these background principles, template the U.S. Supreme Court's role in our system of government. Its core mission is to answer the preeminent legal questions of the day and to provide guidance to everyone—lawyers, litigants, lower courts, and lay citizens—in how to act in accordance with those answers.<sup>15</sup> Every year, the courts take up weighty issues with sweeping political, economic, and social implications. The judiciary has more or less the final say on the limits of our free-speech rights, on the ability of the state to deprive us of our liberty, and on the power of the federal government, to pick but a few examples at random. Sometimes it even picks our president.<sup>16</sup> Administratively, it makes sense for a single entity to have the ultimate authority over the judicial system and its de-

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(1970).

12. See, e.g., *United States v. Moore*, 670 F.3d 222, 230–33 (2d Cir. 2012), cert. denied, 133 S. Ct. 48 (2012).

13. See, e.g., *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 44–45 (1st Cir. 2001).

14. A collateral benefit of reasoned judicial opinions is that parties, particularly losing ones, get the respect and satisfaction of knowing their arguments were heard and resolved rationally, and society appreciates the logic underpinning important judicial decision-making. These benefits are unrelated to the point being made here, because a high court's summary dispositions provide none of these benefits.

15. See, e.g., David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1711 (2007) ("Today's Justices spend roughly nine months a year cloistered in the Supreme Court building in Washington, D.C., making decisions and issuing opinions on some of the most important issues of the day."); Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 571 (2012) ("[J]udicial opinions of the Supreme Court should give guidance to the lower courts so that judges, lawyers, and clients know how to act in the future.").

16. See *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

cisions on such crucial matters; otherwise, we would live in chaos and uncertainty. Psychologically, too, there must be a single point at the top of the pyramid. We need an august building in our capital to gather around when the law is ready to speak with finality on an issue of great importance. We need a finite, visible group of officials to beseech, to praise, and to lambaste as we debate the way forward. And, to come back at last to our starting point, we need, at the end of the day, a single document, meticulously prepared, telling us what the law will be and why.

To recapitulate, the genius of our legal philosophy is its insistence on reasoned explanation, and the genius of our legal structure is its placement of trust in a single body to offer that reasoned explanation when it matters most. It should be apparent by now just how badly the Court failed us in *Baker*. In that paltry order, it offered not a word of explanation. We might as well substitute for our elaborate court system a tea-leaf-spreading ceremony, or send our judges on pilgrimages to visit the oracle. In essence, that is how the lawyers and lower courts attempted to deal with *Baker*'s role in the gay marriage case, as they sought to decode its cryptic pronouncement and apply it to the dispute at hand.

Now to address a couple of potential objections. First, the reader might understandably be distracted by the year *Baker* came down. In 1972, gay marriage was not nearly the hot potato issue it is today.<sup>17</sup> Thus, it might seem unfair to play up the importance of the decision only in retrospect. However, it is not unfair in the slightest, as the Justices should have known better. Any decision by the Court is likely to work its way into an important case, no matter how trivial it may have been at the time, by virtue of the common law reasoning process.<sup>18</sup> The only precedent that binds the Court is its own, and it does not decide so many cases that it can sift through the reporters looking for more favorable law, a luxury a higher-volume court might have. An order like the one in *Baker* places a grain of sand in the oyster shell, one that has inevitably grown into a cumbersome pearl that demands to be dealt with eventually, one way or another.

The persistent critic might continue: if explanation is so pivotal to the Supreme Court's work, *Baker* is but a drop in the

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17. See Lance McMillian, *Adultery as Tort*, 90 N.C. L. REV. 1987, 2010–11 (2012).

18. See *supra* notes 9–11 and accompanying text.

ocean. A vast majority of petitions for certiorari are denied without any written justification.<sup>19</sup> Your beef should be with the whole process, not one measly iteration of it.

To respond, context is everything. When the Court denies a petition for certiorari in a lengthy table of identical orders, it does not purport to make any statement about the law, and except for highly constrained exceptions, no one would ever mistake it for doing so.<sup>20</sup> That a question is not ripe for the Court's review says nothing about what the correct answer to the question is. By contrast, to pronounce the absence of a substantial federal question is very much to establish a legal proposition, and to do so without defending the proposition is to invite needless confusion and conjecture. Phrased differently, and perhaps more simply, the traditional denial of certiorari creates no law. An order like the one in *Baker* does create law, but law that no one understands well enough to even intelligently try to obey.

Now to the most pressing objection. To inform the reader who may have been living under a rock, the Supreme Court finally decided *Windsor*, after what seemed an endless wait. None of the Justices saw fit to include a mention of *Baker* in any of the four opinions, not even in a cursory footnote, not once in seventy-seven total pages of scholarly, exhaustively cited writings. What then, one might ask, is the big deal? The order did not affect the case one bit, so surely we can relegate it to the dustbin of history and not give it another thought? Unfortunately, the answer is no. The very absence of any discussion of *Baker* in the DOMA decision underscores exactly how much of a problem it is. Summary orders from the Supreme Court on the merits are, by the Court's own command, binding law.<sup>21</sup> It is a breathtaking departure from the rule of law as it operates in a common law system for a nation's high court to issue what is, by its own lights, a precedential decision and then to simply ignore that precedent when it is precisely on point in a hugely consequential case, and all because the Court

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19. See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 899 (2009) (Roberts, C.J., dissenting) ("The success rate for certiorari petitions before this Court is approximately 1.1% . . .").

20. The only real lessons that can plausibly be drawn from the Court's denials of certiorari relate to its own views about what requires its intervention. See, e.g., Joshua A.T. Fairfield, *Mixed Reality: How the Laws of Virtual Worlds Govern Everyday Life*, 27 BERKELEY TECH. L.J. 55, 88 n.162 (2012) ("The Supreme Court's denial of certiorari suggests that the circuit split is not significant enough to justify review.").

21. See, e.g., *Mandel v. Bradley*, 432 U.S. 173, 175–76 (1977).

did not bother to explain it. One struggles to imagine a more profound perversion of the judicial model we have spent the last two and a half centuries developing. Perhaps the most troubling thing about *Windsor*'s (non)treatment of *Baker* is the unanimity between the Justices on this point. For a case of such length and significance, it is nothing short of amazing that *no one* refers, even in passing, to what struck the lower courts and the litigants as a potentially dispositive case. Justice Kennedy and his allies felt no need to distinguish it in the majority opinion, and Justice Scalia and his saw no cause to use it as another piece of ammunition in his dissent. For a case that provoked such deep and bitter disagreement between the members of the Court, the ease with which they collectively decided to ignore their own case law is shocking. Ironically, in the Court's *other* watershed gay marriage decision this year, it *did* choose to cite a very similar summary order as authority,<sup>22</sup> proving just how quixotically the Court treats these orders.

Given the prominent role *Baker* played in the litigation leading up to the Supreme Court, the Justices presumably spent some of their own valuable time struggling to decipher these eleven opaque words delivered by their ancestors. Their astonishing failure to even mention this highly relevant precedent likely stemmed from the fact that they, along with the rest of us, had no idea why the *Baker* court issued that ruling, and thus no idea how to apply it. In light of that frustrating experience, they will hopefully see fit not to subject their successors to the same futile and counterproductive labor. In future, they should either fully explain what they are doing, or refrain from comment altogether. We are none of us clairvoyants, not even the eminences at One First Street. Better to write on a blank slate than a slate filled with indecipherable hieroglyphics.

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22. Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013) (citing Don't Bankrupt Wash. Comm. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi., 460 U.S. 1077 (1983), for the proposition that it summarily dismissed an appeal for lack of standing).